



International Trade

PABLO M. BENTES, STACY J. ETTINGER, GREGORY HUSISIAN, VALENTIN A. POVARCHUK, JOHN M. RYAN, MATTHEW T. SIMPSON, P. LEE SMITH, AND MARGARET R. TRETTER*

I. Introduction

In 2008, the field of international trade experienced considerable activity in some areas and virtual stagnation in others. The World Trade Organization (WTO) welcomed two new members in 2008: Ukraine and Cape Verde. Progress on Russia's accession suffered a setback in 2008 due to the Russian-Georgian War in South Ossetia and Abkhazia and other bilateral issues. Additionally, the expiration of Trade Promotion Authority (TPA) in 2007 and the U.S. presidential and congressional elections created uncertainty as to whether the next administration would honor U.S.-negotiated agreements and whether the new Congress would approve them. Thus, despite optimism that a conclusion to the Doha Development Round was possible in 2008, world financial problems and continued disagreement on key issues between developed and developing countries forestalled a global trade deal this year. Negotiations on agriculture and non-agricultural market access (NAMA) modalities also collapsed at the Ministerial meeting in July 2008.

Fourteen new WTO disputes were initiated in 2008, compared to thirteen disputes in 2007. In terms of WTO dispute settlement decision making, thirteen Panel Reports and eight Appellate Body Reports were issued, representing a significant increase compared to 2007. The most significant decision issued by the Appellate Body in 2008 was in *US/Canada—Continued Suspension of Obligations in EC—Hormones*, as it marked the first time the Appellate Body addressed “post-retaliation” situations, which are not covered by current WTO disciplines. The Panels and Appellate Body also continued to express divergent views on the issue of zeroing in 2008. In NAFTA dispute settlement, the binational panel in *Carbon & Alloy Steel Wire Rod from Canada* declared itself a “generic or virtual United States court” but then followed decisions of the WTO Appellate Body regarding

* Mr. Bentes is a Legal Officer with the Appellate Body Secretariat of the World Trade Organization. At the time of this writing, Ms. Ettinger is the Associate Chief Counsel for Import Administration, U.S. Department of Commerce. Mr. Husisian is a partner with Thompson Hine LLP. Mr. Povarchuk is an Associate with Arent Fox LLP. Mr. Ryan is Counsel at Weil, Gotshal & Manges LLP. Mr. Simpson is an Associate with Weil, Gotshal & Manges, LLP. Mr. Smith is an Associate with King & Spalding. Ms. Tretter is an Associate with Mayer Brown LLP.

the legality of the Department of Commerce (DOC) practice of “zeroing” in antidumping cases.

Domestically, the rate of initiation of antidumping and countervailing duty investigations during 2008 decreased from 2007 levels. Notable developments in domestic trade remedies practice included the development of a new “targeted dumping” test by DOC and increasing focus on China. In *United States v. Eurodif, S.A.*, the U.S. Supreme Court, for the first time in history of the trade law, entertained briefs and oral argument regarding an antidumping duty appeal. The issue was whether the DOC correctly ruled that it could apply the antidumping duty law to companies in the business of uranium enrichment. At the time of writing, the Court had yet to issue its decision.

Finally, developing countries were the big winners in this year’s small flurry of legislative activity. Trade preference programs benefiting over 130 developing countries were extended and modified just as they were about to expire. But the movement on trade preference programs stands in stark contrast to the lack of progress on three pending free trade agreements and other trade-related legislation.

II. Negotiation Developments

Little progress was made in trade negotiations in 2008, in part due to the expiration of TPA and in part due to uncertainty created by the U.S. presidential and congressional elections.

A. WTO NEGOTIATIONS

1. *Doha Round*

Despite optimism at the beginning of the year that a conclusion to the Doha Development Round was possible in 2008, world financial problems and continued disagreement on key issues between developed and developing countries forestalled a global trade deal this year. Negotiations on agriculture and non-agricultural market access (NAMA) modalities collapsed at the Ministerial meeting in July 2008. At the time of writing, political support and a pledge from world leaders to conclude modalities negotiations failed to revive talks.

In the agricultural negotiations, the major stumbling block was the inability of the United States and India to agree on a special safeguard mechanism for farmers in developing countries, in particular the tariff trigger for safeguards.¹ Other unresolved agricultural issues include farm tariff simplification, treatment of sensitive products, the creation of new tariff-rate quotas in developed countries, and cotton subsidies.² In the NAMA negotiations, there was some convergence on tariff-cutting for specified sectors of trade, but WTO Members could not bridge disagreements over coefficients on the tariff-cutting formula and the range of flexibilities for developing countries.³

1. See Daniel Pruzin & Eric J. Lyman, *Doha Talks Collapse Over U.S.-India Dispute On Ag Safeguards; Future of Round in Doubt*, INT’L TRADE DAILY (BNA), July 30, 2008; *The United States and India*, WASH. TRADE DAILY, July 31, 2008.

2. *No Flexibility Yet in Agriculture*, WASH. TRADE DAILY, Nov. 18, 2008 [hereinafter *No Flexibility*].

3. See *Some NAMA Successes*, WASH. TRADE DAILY, July 30, 2008.

During the G-20 Summit in November, leaders called for agreement on modalities by the end of 2008.⁴ While agreement by the end of the year seemed theoretically possible, the lack of substantial political will and movement away from entrenched positions killed any hope for agreement. Talks continued in Geneva with the goal of having a ministerial meeting in December 2008.⁵ A ministerial never came to fruition due in part to minimal movement in countries' positions.

2. Accession Negotiations

The WTO welcomed two new members in 2008. Ukraine became the 152nd member of the WTO on May 16, 2008,⁶ and Cape Verde became the 153rd member on July 23, 2008.⁷ Ukraine's Rada (the country's parliament), however, has been slow to pass all the legislation necessary to comply with its WTO obligations, including amendments to its food safety laws and a bill to lower its customs tariffs.⁸ While Equatorial Guinea was the only country to start the accession process this year,⁹ several of the twenty-eight other countries with pending applications continued to make progress towards accession in 2008.¹⁰

Progress on Russia's accession suffered a setback in 2008 due to the Russian-Georgian War in South Ossetia and Abkhazia and other bilateral issues. In the first half of the year, the United States was pushing for Russian accession by the end of 2008.¹¹ But U.S. support faltered after the crisis in Georgia, with U.S. Secretary of State Condoleezza Rice stating in September 2008 that Russia's WTO accession was "going nowhere."¹² Other roadblocks to Russia's WTO membership bid arose in 2008, including continued U.S. concern over Russian intellectual property protection¹³ and E.U. opposition to Russian export duties on timber.¹⁴ Despite these obstacles, the Russian government remains com-

4. Declaration, Leaders of the Group of Twenty, Summit on Financial Markets and the World Economy (Nov. 15, 2008), available at http://www.g20.org/Documents/g20_summit_declaration.pdf.

5. *Doha Talks Begin Year-End Push After Strong G20 Political Statement*, INSIDE U.S. TRADE, Nov. 17, 2008. See Press Release, World Trade Organization [WTO], Ukraine Becomes the WTO's 152nd Member (May 16, 2008), available at http://www.wto.org/english/news_e/news08_e/acc_urk_may08_e.htm.

7. See Press Release, WTO, Cape Verde Becomes the WTO's 153rd Member (July 23, 2008), available at http://www.wto.org/english/news_e/news08_e/acc_capverde_july08_e.htm.

8. See Sergei Blagov, *Ukraine Struggles to Adopt Legislation Related to the WTO*, INT'L TRADE DAILY (BNA), Oct. 16, 2008.

9. See Press Release, WTO, General Council Establishes Working Party for Equatorial Guinea (Feb. 5, 2008), available at http://www.wto.org/english/news_e/news08_e/acc_equatorial_guinea_feb08_e.htm.

10. See Summary Table of Ongoing Accessions, www.wto.org/english/thewto_e/acc_e/status_e.htm (last visited Apr. 1, 2009).

11. See *U.S. Presses Russian Accession to WTO After Bush-Putin Pledge*, INSIDE U.S. TRADE, Apr. 11, 2008.

12. Gary G. Yerkey, *Russia's Bid to Join WTO 'Going Nowhere,' Rice Says, Citing Fallout From Georgia Crisis*, INT'L TRADE DAILY (BNA), Sept. 25, 2008.

13. See OFFICE OF U.S. TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT 34 (Apr. 25, 2008), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Special_301_Report/asset_upload_file553_14869.pdf. Russia was kept on the Priority Watch List due to weak enforcement against piracy and counterfeiting in Russia, particularly with respect to production of infringing optical media and Internet piracy. See also Press Release, Office of U.S. Trade Representative, USTR Issues Special 301 Report (Apr. 25, 2008), available at http://www.ustr.gov/Document_Library/Press_Releases/2008/April/USTR_Issues_2008_Special_301_Report.html.

14. See Daniel Pruzin, *EU Starts Campaign to End Export Curbs on Raw Materials, May Initiate WTO Case*, INT'L TRADE DAILY (BNA), Sept. 30, 2008.

mitted to joining the WTO,¹⁵ and Prime Minister Putin appointed a commission to supervise and manage the WTO accession process.¹⁶

B. BILATERAL/REGIONAL NEGOTIATIONS

1. *Status of Bilateral Trade Agreements*

United States' bilateral trade negotiations were largely stalled in 2008. Negotiations of the U.S.-Malaysia free trade agreement (FTA) quietly resumed this year¹⁷ but did not make any discernible progress. The Malaysian government has indicated its hope for negotiating more favorable terms with the incoming Obama administration.¹⁸ Although negotiations between the United States and the Southern Africa Customs Union (SACU) remain suspended, the United States signed a Trade, Investment and Development Cooperation Agreement with SACU in July 2008, which will act as a "formal mechanism" for concluding interim trade-related agreements that could lead to a FTA in the future.¹⁹ The U.S.-Thailand and U.S.-United Arab Emirates FTA talks remained dormant this year.

The United States and China began negotiating a bilateral investment treaty (BIT) in 2008. The launch of the BIT was announced at the June 2008 meeting of the U.S.-China Strategic Economic Dialogue.²⁰ U.S. and Chinese negotiators held several rounds of talks in the fall of 2008. Initially, progress was slow, however, with the meetings reportedly focused more on a review of U.S. BIT model text and less on substantive negotiations.²¹ But headway is expected in 2009 as the Chinese tabled their own proposed draft for the BIT during November 2008 negotiations.²²

2. *Anti-Counterfeiting Trade Agreement*

Negotiations on the multilateral Anti-Counterfeiting Trade Agreement (ACTA) began in June 2008 and several rounds of discussion were held through the end of the year. Other participants in the negotiations include Australia, Canada, the European Union, Japan, Jordan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, and the

15. See Sergei Blagov, *Russia's Putin Pledges to Pursue Accession to WTO, as Cabinet Adopts Trade Blueprint*, INT'L TRADE DAILY (BNA), Oct. 28, 2008.

16. See Sergei Blagov, *Russian Government Forms Commission To Oversee Country's WTO Entry Efforts*, INT'L TRADE DAILY (BNA), Oct. 31, 2008.

17. See Amy Tsui, *President Bush to Visit Thailand During Trip to Asia, as Well as China, Korea*, INT'L TRADE DAILY (BNA), July 7, 2008.

18. See *Around the Globe*, WASHINGTON TRADE DAILY, Nov. 19, 2008.

19. Press Release, Office of U.S. Trade Representative, *Ambassador Schwab Signs Historic Trade Agreement with Countries of the Southern African Customs Union* (July 16, 2008), available at http://www.ustr.gov/assets/Document_Library/Press_Releases/2008/July/asset_upload_file628_15019.pdf.

20. OFFICE OF U.S. TRADE REPRESENTATIVE, UNITED STATES LAUNCHES NEGOTIATIONS OF AN INVESTMENT TREATY WITH CHINA (June 2008), available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2008/asset_upload_file993_14943.pdf.

21. *China Update*, CHINESE TRADE EXTRA (Inside Washington), Nov. 14, 2008.

22. Senior U.S., Chinese Officials Signal Progress on Investment Pact, CHINESE TRADE EXTRA (INSIDE WASHINGTON), Dec. 4, 2008.

United Arab Emirates,²³ though not every country attended each round.²⁴ Specific details on the negotiations were not publicized.²⁵ Several public interest groups sued in September 2008 under the Freedom of Information Act to obtain a copy of the draft treaty text.²⁶ At a public meeting on ACTA also in September, the lead U.S. negotiator stated that there was no "specific draft text" to disclose and that negotiations were largely guided by already-concluded U.S.-FTA negotiations, particularly the U.S.-South Korea FTA.²⁷ The U.S. Trade Representative (USTR) believed that ACTA could come into force into 2009 if the next administration continues to move forward with negotiations.²⁸

3. *Trans-Pacific Strategic Economic Partnership*

The United States announced in September 2008 that it would enter negotiations to join the Trans-Pacific Strategic Economic Partnership, known as the P-4.²⁹ The P-4 is a free trade agreement among Brunei Darussalam, Chile, Singapore, and New Zealand. The United States participated in three rounds of negotiations on the financial services and investment chapters before deciding to initiate efforts to join the P-4 as a full party.³⁰ Australia, Peru, and Vietnam have also expressed interest in joining the P-4.³¹ The next round of negotiations was scheduled for March 2009 but were postponed while the Obama administration assessed its trade policy priorities and installed its trade leadership.³²

III. WTO and NAFTA Dispute Settlement Activity

The number of new disputes brought before the WTO in 2008 was commensurate with the number of cases initiated in previous years. Fourteen new disputes were initiated in

23. See OFFICE OF U.S. TRADE REPRESENTATIVE, TRADE FACTS: ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) (Aug. 4, 2008).

24. Jordan and the United Arab Emirates did not participate in the discussions held in October 2008. See Amy Tsui, *ACTA Negotiating Members Met in Japan Oct. 8-9 With Focus on Criminal Penalties*, INT'L TRADE DAILY (BNA), Oct. 14, 2008.

25. See Carey Lening, *Citizens' Groups, Others Sue USTR Seeking Public Disclosure of Counterfeiting Treaty*, INT'L TRADE DAILY (BNA), Sept. 22, 2008.

26. *Id.*

27. See Carey Lening & Anandashankar Mazumdar, *USTR Official Cites Confidentiality 'Understandings' in ACTA Negotiations*, INT'L TRADE DAILY (BNA), Sept. 23, 2008.

28. See Rossella Brevetti, *U.S.-Oman Trade Pact Expected to Enter Into Force After Long Delay, Veroneau Says*, INT'L TRADE DAILY (BNA), Nov. 17, 2008.

29. Press Release, United States Trade Representative, Trans-Pacific Partners and United States Launch FTA Negotiations (Sept. 22, 2008), available at http://www.ustr.gov/Document_Library/Press_Releases/2008/September/Schwab_Statement_on_launch_of_the_US_Negotiations_to_join_the_Trans-Pacific_Strategic_Economic_Partnership_Agreement.html.

30. OFFICE OF U.S. TRADE REPRESENTATIVE, TRADE FACTS: UNITED STATES TO NEGOTIATE PARTICIPATION IN TRANS-PACIFIC STRATEGIC ECONOMIC PARTNERSHIP (Sept. 2008), available at http://www.ustr.gov/assets/World_Regions/Southeast_Asia_Pacific/Trans-Pacific_Partnership_Agreement/Fact_Sheets/asset_upload_file602_15133.pdf; see also USTR, *Ambassadors Hopeful Obama Will Back Transpacific FTA*, INSIDE U.S. TRADE, Nov. 4, 2008 [hereinafter *Ambassadors Hopeful*].

31. *Ambassadors Hopeful*, *supra* note 30.

32. *Delaying a TPP Meeting*, WSSH. TRADE DAILY, Mar. 5, 2009.

2008, compared to thirteen disputes in 2007.³³ Complaints initiated in 2008 addressed claims under a wide variety of agreements, including the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (AD Agreement), and the Agreement on Technical Barriers to Trade (TBT).

In WTO dispute settlement decision making, 2008 was a very busy year. In total, thirteen Panel Reports and eight Appellate Body Reports (in ten appeals)³⁴ were issued, which represented a significant increase in comparison to the eight Panel Reports and five Appellate Body Reports that were issued in 2007.³⁵

A. PANEL AND APPELLATE BODY REPORTS

1. *US/Canada—Continued Suspension of Obligations in EC-Hormones*

The most significant decision issued by the Appellate Body in 2008 was in *US/Canada—Continued Suspension of Obligations in EC-Hormones*.³⁶ In that dispute, the Appellate Body addressed claims by the European Communities (EC) that the United States and Canada had violated Articles 22.8 and 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) by failing to remove their retaliatory measures vis-à-vis the EC following the adoption of a measure that allegedly achieved compliance with the Dispute Settlement Body's (DSB's) recommendations and rulings in *EC-Hormones*.³⁷ This was the first time the Appellate Body addressed "post-retaliation" situations, which are not covered by current WTO disciplines. Also significant were the Appellate Body's findings concerning the Sanitary and Phytosanitary Agreement (SPS Agreement), in particular Articles 5.1 and 5.7 thereof.

The United States and Canada successfully appealed the Panel's findings that they committed "procedural violations" under Article 23 of the DSU by maintaining their retaliatory measures against the EC following the adoption of a measure that allegedly implemented the decision in *EC-Hormones*. In a ruling that significantly reinforces the effectiveness of trade sanctions as an enforcement mechanism under WTO rules, the Appellate Body clarified that, under Article 22.8 of the DSU, the application of retaliatory measures may continue until *substantive compliance* with the covered agreements is achieved

33. See WTO, Chronological List of Disputes Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Apr. 1, 2009).

34. The Appellate Body decided to issue a single, consolidated report in the appeals in *US-Shrimp (Thailand)* and *US-Customs Bond Directive*; and in *EC-Bananas III (Article 21.5-Ecuador II)*, and *EC-Bananas III (Article 21.5-US)*. See *supra* notes 24 and 29.

35. See WorldTradeLaw.net, WTO Dispute Settlement Reports, <http://www.worldtradelaw.net/> (last visited Apr. 1, 2009).

36. See Appellate Body Report, *US—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/AB/R (Oct. 16, 2008); Appellate Body Report, *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS321/AB/R, (Oct. 16, 2008).

37. See Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R and WT/DS48/AB/R (Jan. 16, 1998). The Appellate Body found that the EC's import ban on hormone-treated beef was not "based on" a risk assessment, as required by Article 5.1 of the SPS Agreement because scientific studies in support of the measure were not sufficiently specific to the particular risks at issue.

by the implementing Member.³⁸ Until substantive compliance is achieved, or confirmed in WTO adjudication, the authorization granted by the DSB to suspend concessions does not lapse.³⁹ For this reason, the Appellate Body concluded that the U.S. and Canada were neither "seeking the redress of a violation," nor making a "determination to the effect that a violation has occurred" within the meaning of Articles 23.1 and 23.2(a) of the DSU by continuing to retaliate against the EC.⁴⁰

Furthermore, the Appellate Body established that a compliance proceeding under Article 21.5 of the DSU is the "proper course of action within the procedural structure of the DSU"⁴¹ in situations where there is disagreement as to whether substantive compliance has been achieved by measures taken after imposition of retaliatory measures. In so finding, the Appellate Body rejected the EC's argument that the implementing Member (the respondent in the original case) could not "self-initiate" proceedings under Article 21.5 of the DSU. The Appellate Body held that either the retaliating Member or the implementing Member could initiate Article 21.5 proceedings, because "both the suspending Member and the implementing Member share the responsibility to ensure that the suspension of concessions is not applied indefinitely."⁴² The Appellate Body explained that the burden of proof for the original respondent in a "self-initiated" Article 21.5 proceeding would be

a clear description of its implementing measure, and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings, so as to place the Article 21.5 panel in a position to make an objective assessment of the matter and, in the absence of rebuttal, to rule in favour of the original respondent.⁴³

For all other issues before the Article 21.5 Panel, including claims that the implementing measure violates provisions otherwise not covered by the DSB's recommendations rulings, the burden of proof would rest with the original complainant.⁴⁴

In the same dispute, the EC was successful in reversing the Panel's findings that its import ban on hormone-treated beef was not consistent with Articles 5.1 and 5.7 of the SPS Agreement. Preliminarily, the Appellate Body found that the Panel infringed the EC's due process rights by appointing and consulting as experts two scientists who had been directly involved in the risk assessments underlying the international standards from which the EC's measure deviated.⁴⁵ In addition, the Appellate Body found that the Panel erred by conducting a *de novo* review of the EC's risk assessment when the standard of review applicable under Article 5.1 required the Panel to simply identify the scientific evidence that served as a basis for the EC's risk assessment; verify that such evidence

38. See Appellate Body Report, *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, *supra* note 36, at ¶ 306.

39. See *id.* ¶ 310.

40. *Id.* ¶ 292.

41. See *id.* ¶ 345.

42. See *id.* ¶ 348.

43. See *id.* ¶ 362.

44. See *id.* ¶ 364.

45. See *id.* ¶ 481.

comes from respected and qualified sources; and determine whether the reasoning articulated on the basis of the scientific evidence is objective and coherent.⁴⁶

Finally, the Appellate Body reversed the "critical mass" standard developed by the Panel to examine whether the relevant scientific evidence on five of the hormones at issue was "insufficient" within the meaning of Article 5.7 of the SPS Agreement. The Appellate Body explained that the existence of international standards for those hormones "has probative value, but is not dispositive," of the question of whether the relevant scientific evidence is insufficient, particularly where a Member adopts an SPS measure that does not conform to those international standards.⁴⁷ Thus, rather than requiring a paradigm shift in the scientific knowledge, it is sufficient that new scientific evidence "casts doubts as to whether the previously existing body of scientific evidence still permits of a sufficiently objective assessment of risk."⁴⁸ Despite these findings, the Appellate Body concluded that it could not complete the legal analysis and determine whether the EC's import ban on hormone-treated beef was justified under Articles 5.1 and 5.7 of the SPS Agreement. This question shall be addressed in the Article 21.5 DSU panel that the Appellate Body recommended that the United States, Canada, and the EC initiate.⁴⁹ By virtue of the Appellate Body's decision, however, the United States and Canada may continue to apply sanctions against the EC pending the final outcome of those proceedings.

2. *China—Auto Parts*

On December 15, 2008, the Appellate Body issued its first ruling against China since its accession to the WTO in 2001. In *China—Auto Parts*, Canada, the EC and the U.S. successfully challenged a twenty-five percent charge imposed by China on auto parts that are subsequently assembled into complete motor vehicles.⁵⁰ The Appellate Body largely rejected China's appeal and upheld the Panel's findings the Chinese measure violated Articles III:2 and III:4 of the GATT, because it discriminated against imported over domestic like auto parts.⁵¹ In so finding, the Appellate Body upheld the Panel's important threshold finding that the Chinese measure should be characterized as an "internal charge" under Article III:2, rather than a border measure under Article II.1(b) of the GATT. The Appellate Body reasoned that this was the case because the obligation to pay the charge accrued *internally*, after the auto parts have been assembled into complete vehicles.⁵²

But China successfully challenged the Panel's finding that the tariff treatment of completely knocked-down (CKD) or semi-knocked down (SKD) kits⁵³ violated China's commitment under paragraph 93 of its Accession Working Party Report not to apply a tariff

46. See *id.* ¶ 602.

47. See *id.* ¶¶ 697, 711.

48. See *id.* ¶ 703.

49. See *id.* ¶ 737.

50. Appellate Body Report, *China—Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, and WT/DS342/AB/R, (Dec. 15, 2008).

51. See *id.*, paras. 186 and 197.

52. See *id.*, paras. 161-62.

53. CKD and SKD kits are all or nearly all of the parts and components necessary to assemble a complete motor vehicle, which must be packaged and shipped in a single shipment, and which must go through the assembly process in the importing country to become a complete vehicle. See *id.*, para. 210.

greater than ten percent if China created tariff lines for CKD and SKD kits. The Appellate Body found that the Panel erred in characterizing the twenty-five percent charge applicable on imports of CKD and SKD kits as an “internal charge”, and therefore reversed this finding.⁵⁴

3. *US—Stainless Steel and US—Continued Existence of Zeroing*

In 2008, Panels and the Appellate Body continued to take different views on the question of whether WTO disciplines permit the practice of zeroing. In *US—Stainless Steel*, the Appellate Body reversed the Panel and found that the use of zeroing in periodic reviews is inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of GATT, both “as such” and “as applied.”⁵⁵ Following the analytical approach developed in *US—Zeroing (EC)*⁵⁶ and *US—Zeroing (Japan)*,⁵⁷ the Appellate Body reiterated its interpretation that the concepts of “dumping” and “margins of dumping” in Article VI of GATT are defined in relation to a “product” and address the pricing practice of exporters.⁵⁸ For this reason, dumping cannot be found to occur at the transaction or importer-specific level.⁵⁹ The Appellate Body also considered that zeroing in periodic reviews is inconsistent with Article 9.3 of the AD Agreement because it results in the levy of duties that exceed the exporter’s or foreign producer’s dumping margin.⁶⁰

Also in *US—Stainless Steel*, the Appellate Body made important findings concerning precedents in WTO dispute settlement. In its appeal, Mexico claimed that the Panel’s decision to depart from well-established Appellate Body jurisprudence on zeroing violated Article 11 of the DSU, which regulates panels and establishes the standard of review. Although the Appellate Body confirmed its interpretation that reports are not binding except with respect to the parties to a particular dispute, it held that subsequent panels are not free to disregard legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports.⁶¹ Controversially, the Appellate Body added that the requirement to provide “security and predictability” to the multilateral trading system under Article 3.2 of the DSU implies that “absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”⁶² The Appellate Body, nevertheless, refrained from finding a violation of Article 11 of the DSU because in its estimation the Panel’s error flowed from its “misguided understanding” of the legal provisions at issue.⁶³

The Appellate Body’s ruling on the value of precedent in *US—Stainless Steel* had immediate effects on subsequent panels that addressed the question of zeroing. On October 1,

54. See *id.*, paras. 244–45.

55. See Appellate Body Report, *US—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008) [hereinafter *US—Stainless Steel*].

56. See Appellate Body Report, *US—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/AB/R (Apr. 18, 2006).

57. See Appellate Body Report, *US—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007).

58. See *US—Stainless Steel*, *supra* note 55, at ¶¶ 86, 94.

59. See *id.* ¶¶ 98, 99.

60. See *id.* ¶ 102.

61. See *id.* ¶ 158.

62. See *id.* ¶ 160.

63. See *id.* ¶ 162.

2008, the Panel in *US—Continued Existence of Zeroing* decided for the first time to follow the Appellate Body's case law on this issue and found, despite having numerous objections to the reasoning developed by the Appellate Body, that the application of zeroing in periodic reviews is inconsistent with Article VI:2 of the GATT and 9.3 of the AD Agreement.⁶⁴ The Panel also ruled against the use of zeroing in original investigations and in sunset reviews.

4. *India—Additional Duties*

On October 30, 2008, the Appellate Body issued its report in *India—Additional Duties*.⁶⁵ This dispute concerned claims by the United States that the additional and "extra-additional" duties imposed by India on imports of alcoholic beverages and other products resulted in the imposition of "ordinary customs duties" or "other duties or charges" that exceeded the bound rates set out in India's Schedule of Concessions, in violation of Article II:1(a) and (b) of GATT. In response, India claimed that the additional and extra-additional duties were justified under Article II:2(a) of GATT, which permits Members to impose charges on imports in excess of bound rates provided that such charges are "equivalent" to internal taxes imposed on domestic goods consistent with Article III:2 of GATT, and as such were not covered by Article II:1(b).

On appeal, the United States successfully challenged the Panel's finding that the United States had failed to establish a *prima facie* case that the additional and extra-additional duties were inconsistent with Article II:1 (a) and (b) of GATT. The Appellate Body reversed the Panel's finding that Article II:1(b) of GATT covers only duties and charges that "inherently discriminate against imports."⁶⁶ The Appellate Body found instead that the second sentence of Article II:1(b) covers "*all* duties or charges of *any kind* imposed on or in connection with importation other than [ordinary customs duties], including those duties or charges that *do not* inherently discriminate against imports."⁶⁷

The Appellate Body also reversed the Panel's conclusion that the term "equivalent" in Article II:2(a) of GATT does not require a quantitative comparison between the border charge and the internal tax imposed on domestic goods. The Appellate Body found that the determination of whether a border charge is equivalent to an internal tax imposed on domestic goods "must also include quantitative considerations relating to their effect and amount."⁶⁸ This ruling confirms that, in order to be justified under Article II:2(a), a border charge must not exceed the internal tax it is designed to offset.

Even though the Appellate Body did not complete the legal analysis, it considered that the additional and extra-additional duties would not be justified under Article II:2(a) of GATT insofar as they would result in charges on imports that exceed internal taxes on domestic products and consequently would violate Article II:1(b) of GATT to the extent that they would result in the imposition of duties in excess of those set forth in India's

64. See Panel Report, *US—Continued Existence and Application of Zeroing Methodology*, WT/DS350/R (Oct. 1, 2008).

65. See Appellate Body Report, *India—Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R (Oct. 30, 2008).

66. *Id.* ¶158.

67. See *id.* (emphasis in original).

68. See *id.* ¶ 175.

Schedule of Concessions.⁶⁹ During the course of the proceedings, India ceased to apply the additional and extra-additional duties on imported products, subject to certain conditions.

5. *Other Disputes*

The Appellate Body and Panels issued three additional decisions in 2008. On July 16, 2008, the Appellate Body issued its report for the appeals in *US—Shrimp (Thailand)* and *US—Customs Bond Directive*.⁷⁰ The Appellate Body upheld the Panels' finding that the *Ad Note* to Article VI:2 and 3 of GATT (*Ad Note*) authorizes the taking of reasonable security after the imposition of an anti-dumping duty order, pending the determination of the final liability for the payment of the anti-dumping duty.⁷¹ But the Appellate Body found that the application of an "enhanced continuous bond requirement" by the U.S. on subject imports of frozen warm water shrimp did not constitute "reasonable security" for the payment of anti-dumping duties within the meaning of the *Ad Note* because the U.S. had failed to show that anti-dumping duty rates in respect of subject shrimp were likely to increase, resulting in significant additional unsecured liability.⁷²

One additional decision addressing claims under the SCM Agreement was issued in 2008. In *Mexico—Olive Oil*, the EC was partially successful in its challenge against Mexico's imposition of definitive countervailing measures on imports of olive oil.⁷³ Although the Panel rejected a number of claims advanced by the EC, it considered that Mexico had acted inconsistently with Article 11.11 of the SCM Agreement by failing to conclude the investigation within eighteen months from its initiation and with Article 12.4.1 of that Agreement by failing to require non-confidential summaries of information submitted during the course of the investigation on a confidential basis. The Panel also found that Mexico had violated Article 15.1 of the SCM Agreement, which requires that injury determinations be based on positive evidence, because Mexico's investigating authority limited its injury analysis to the periods from April to December of 2000, 2001, and 2002.⁷⁴ The Panel report in *Mexico—Olive Oil* was the only decision not to be appealed in 2008, and the DSB adopted it on October 21, 2008.

69. See *id.* ¶¶ 214, 221.

70. See Appellate Body Report, *US—Measures Relating to Shrimp from Thailand* and *US—Customs Bond Directive for Merchandise Subject to Anti-Dumping /Countervailing Duties*, WT/DS343/AB/R, WT/DS345/AB/R (July 16, 2008). Due to the similar subject matter, the Appellate Body issued a single report on the appeals presented by Thailand and India, respectively. The Panel Report in *US—Shrimp (Thailand)*, WT/DS343/R (Feb. 29, 2008), also included a finding that zeroing in average-to-average comparisons in original investigations is not consistent with Article 2.4.2 of the Anti-Dumping Agreement. The United States did not challenge this finding on appeal.

71. See *id.* ¶ 243.

72. See *id.* ¶ 268.

73. See Panel Report, *Mexico—Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R (Sept. 4, 2007).

74. See *id.* ¶ 8.1.

B. DISPUTES REGARDING IMPLEMENTATION

Disputes concerning implementation of the DSB's ruling and recommendations continued to represent a significant portion of the agenda of the DSB in 2008 with the issuance of two Panel and two Appellate Body reports under Article 21.5 of the DSU.

1. *US—Upland Cotton (Article 21.5—Brazil)*

On June 2, 2008, the Appellate Body issued its report in *US—Upland Cotton (Article 21.5—Brazil)*.⁷⁵ The Appellate Body upheld the Panel's ultimate finding that the United States failed to fully implement the DSB's recommendations and rulings in the original proceedings.⁷⁶ The Appellate Body found that export credit guarantees provided under the United States' revised General Sales Manager (GSM) 102 programme constituted "export subsidies" within the meaning of item (j) of the Illustrative List of Export Subsidies annexed to the SCM Agreement because the premiums charged under the programme continued to be inadequate to cover its long-term operating costs and losses.⁷⁷ The Appellate Body also held that the effect of marketing loan and counter-cyclical payments from the United States to upland cotton producers is significant price suppression in the world market for this product within the meaning of Article 6.3(c) of the SCM Agreement, resulting in "present" serious prejudice to the interest of Brazil under Article 5(c) of that Agreement.⁷⁸

2. *EC—Bananas (Article 21.5—Ecuador II and U.S.)*

On November 26, 2008, the Appellate Body confirmed the Panel's decision that the EC's revised import regime for bananas fell short of implementing the DSB's recommendations and rulings in *EC—Bananas III*.⁷⁹ The Appellate Body found that the duty-free tariff quota reserved for African, Caribbean, and Pacific (ACP) countries was inconsistent with Articles XIII:1 and 2 of GATT because non-ACP suppliers were denied access to the tariff quota.⁸⁰ The Appellate Body also upheld, albeit for different reasons, the Panel's finding that the EC's €176/mt tariff for Most-Favored Nation (MFN) bananas, without consideration of the tariff quota bound at an in-quota tariff of €75/mt, resulted in import duties that exceeded the bound rates in the EC's Schedule of Concessions in violation of Article II:1(b) of GATT.⁸¹

75. See Appellate Body Report, *US—Subsidies on Upland Cotton—Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW (June 2, 2008) [hereinafter *US—Upland Cotton (Article 21.5—Brazil)*].

76. See Appellate Body Report, *US—Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005). The Panel and the Appellate Body found that the United States provided domestic support, export subsidies, and import substitution subsidies to upland cotton, as well as export credit guarantees to upland cotton and other products, in violation of U.S. obligations under the Agreement on Agriculture and the SCM Agreement.

77. See *US—Upland Cotton (Article 21.5—Brazil)*, *supra* note 75, at ¶ 322.

78. See *id.* ¶ 447.

79. See Appellate Body Report, *EC—Regime for the Importation, Sale and Distribution of Bananas (Second Recourse to Article 21.5 of the DSU by Ecuador)*, WT/DS27/AB/RW2/ECU (Nov. 26, 2008) [hereinafter *Second Recourse*]; *EC—Regime for the Importation, Sale and Distribution of Bananas (Recourse to Article 21.5 of the DSU by the US)*, WT/DS27/AB/RW/USA (Nov. 26, 2008).

80. See *Second Recourse*, *supra* note 79, at ¶ 345.

81. See *id.* ¶ 455.

C. NAFTA PANEL REPORTS

When a NAFTA binational panel reviews an antidumping or countervailing duty determination to determine whether it is in accordance with law, such law includes “judicial precedents to the extent a court of the importing party would rely on such materials.”⁸² The panel in *Carbon & Alloy Steel Wire Rod from Canada*, however, disregarded several Federal Circuit precedents finding Commerce’s practice of “zeroing” in antidumping cases to be legal, and instead followed decisions of the WTO Appellate Body, which reached the opposite conclusion.⁸³ The binational panel declared itself a “generic or virtual United States court,” which apparently meant something akin to a U.S. federal appeals court for its own virtual circuit.⁸⁴ The dispute was settled and the proceeding terminated before final panel action.⁸⁵ Otherwise, the United States could have brought an extraordinary challenge under NAFTA Article 1904.13, claiming that the panel “manifestly exceeded its powers, authority or jurisdiction” by applying the wrong body of law. The NAFTA Article extraordinary challenge standard is exceptionally high, but an appeal of this decision might have resulted in the first case finding that standard to be satisfied.

In other binational panel reviews, two decisions affirmed the agency determinations,⁸⁶ and one case was dismissed for lack of jurisdiction because the antidumping order had been revoked pursuant to the U.S.-Canada Softwood Lumber Agreement.⁸⁷

IV. U.S. Trade Remedy Cases

A. ADMINISTRATIVE DETERMINATIONS

The rate of initiation of antidumping and countervailing duty investigations during 2008 decreased from 2007 levels with sixteen antidumping investigations and six countervailing duty investigations initiated.⁸⁸ Many cases initiated in 2007, however, reached their final determinations in 2008, creating another busy year for international trade at the agency level.

82. NAFTA Article 1904.2.

83. See North American Free Trade Agreement [NAFTA] Panel Decision, *Carbon and Certain Alloy Steel Wire Rod from Canada*, 21, USA-CDA-2006-1904-04 (Nov. 28, 2007), available at <http://www.worldtradelaw.net/nafta19/wirerod-dumping-nafta19.pdf>.

84. *Id.*, at 21.

85. See NAFTA, Article 1904 Binational Panel Reviews: Notice of Consent Motion To Terminate Panel Review, 73 Fed. Reg. 23,183 (Apr. 29, 2008).

86. Stainless Steel Sheet and Strip in Coils from Mexico, Case No. USA-MEX-2005-1904-06 (U.S. Int’l Trade Comm’n Sept. 10, 2008), <http://www.worldtradelaw.net/nafta19/stainlessincoils-injurysunset-nafta19.pdf>; NAFTA Panel Decision, *Final Determination of the Antidumping Investigation of Carbon Steel Tube Imports With Straight Longitudinal Seams from the United States*, MEX-USA-2005-1904-1 (Mar. 13, 2008).

87. NAFTA Panel Decision, *Certain Softwood Lumber Products From Canada: Final Scope Ruling Regarding Entries Made Under HTSUS 4409.10.05*, USA-CDA-2006-1904-05 (June 25, 2008).

88. See United States Department of Commerce, International Trade Administration, Import Administration, Antidumping and Countervailing Duty Investigations: Jan 01, 2000 to Current, <http://ia.ita.doc.gov/stats/inv-initiations-2000-current.html> (last visited Apr. 2, 2009).

1. *Department of Commerce's New Targeted Dumping Methodology*

In *Certain Nails from the People's Republic of China and the United Arab Emirates*, the Department of Commerce (DOC) changed its targeted dumping calculation methodology. At the preliminary stage in both proceedings, DOC applied the targeted dumping standards and methodologies consistent with *Coated Free Sheet from Korea*,⁸⁹ using the preponderance at 2 percent (P/2) test, and determined that targeted dumping was taking place.⁹⁰ DOC also stated that it was reassessing the framework and standards for its targeted dumping analysis, intended to develop a new framework, and requested comments.⁹¹ Thereafter, DOC developed a new test to determine whether targeted dumping had occurred.

After the preliminary results, DOC issued a post-preliminary determination relating to its targeted dumping calculation methodologies relying on the new methodology.⁹² The first prong of the new methodology, the "standard deviation test," required DOC to "determine the share of the alleged target's (whether purchaser, region, or time period) purchases of identical merchandise,⁹³ by sales value, that are at prices more than one standard deviation below the average price of that identical merchandise to all customers."⁹⁴ DOC stated that if the total sales value of purchases that were more than one standard deviation below average price "exceeds thirty-three percent of the sales value to the alleged target of the identical merchandise, then the pattern requirement" under 19 C.F.R. § 351.414(f)(1)(i) was met.

The second prong of the new methodology, the "price gap test," required DOC to examine all sales that pass the standard deviation test and to determine the "sales value for which the difference between the average price to the alleged target and the lowest non-target average price exceed[ed] the average price gap (weighted by sales value) observed in the non-targeted group."⁹⁵ If the share of these sales exceeded five percent of sales value

89. *Coated Free Sheet from the Republic of Korea: Final Determination of Sales at Less Than Fair Value* 72 Fed. Reg. 60,630, Issues and Decision Memorandum cmt. 3 (Oct. 25, 2007), available at <http://ia.ita.doc.gov/frn/summary/korea-south/E7-21035-1.pdf>.

90. *Certain Steel Nails from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 3928, 3940 (Jan. 23, 2008); see also *Certain Steel Nails from the United Arab Emirates: Notice of Preliminary Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 3945, 3947-48 (Jan. 23, 2008).

91. *Id.*

92. Memorandum from Stephen J. Claeys, Deputy Assistant Sec'y, Import Admin., to David M. Spooner, Assistant Sec'y, Import Admin., on Antidumping Duty Investigations of Certain Steel Nails from the Peoples Republic of China and the United Arab Emirates (Apr. 21, 2008) (on file with Import Admin.) [hereinafter *Post-Preliminary Determinations on Targeted Dumping*].

93. Commerce identifies identical products by control number. *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination at Less Than Fair Value*, 73 Fed. Reg. 33,985, Issues and Decision Memorandum cmt. 4, (June 16, 2008), available at <http://ia.ita.doc.gov/frn/summary/uae/E8-13490-1.pdf> [hereinafter *Nails from the UAE*].

94. *Post-Preliminary Determinations on Targeted Dumping*, *supra* note 92, at 7-8. The standard deviation and the average price are calculated using a POI-wide average price weighted by sales value to the alleged target and POI-wide average price weighted by sales value to each distinct non-targeted entity of identical merchandise.

95. *Id.* at 8.

to the alleged target of the identical merchandise, then the significant difference requirement was met, and DOC determines that targeted dumping had occurred.⁹⁶

DOC upheld its new methodology in the final results but applied a volume-based method, rather than the value-based method used in the post-preliminary analysis, to both the standard deviation test and the price gap test.⁹⁷ In upholding the new methodology, DOC stated that the new methodology was “statutorily and statistically superior to the P/2 test for identifying targeted dumping.”⁹⁸ Specifically, DOC stated that the P/2 test collapsed the pattern and significant differences requirements and relied on a “single, bright-line price threshold of two percent to define targeted dumping that does not account for price variations specific to the market in question.”⁹⁹ DOC noted that it had initiated a separate process to gather additional comments and may further revise its targeted dumping methodology in future investigations.¹⁰⁰ In fact, the DOC withdrew the regulations on targeted dumping on December 10, 2008.¹⁰¹

2. Countervailing Duty Determinations

There were several significant developments in 2008 relating to the DOC’s treatment of Chinese products under the SCM Agreement.

a. The Countervailability of Subsidies Conferred Prior to China’s Accession to the WTO

In the *Circular Welded Pipe from China*, DOC determined it was “appropriate and administratively desirable” to establish a uniform date from which to identify and measure subsidies in China.¹⁰² In its preliminary determination, DOC adopted December 11, 2001, as the date from which it would identify and measure subsidies.¹⁰³

During the final phase of the investigation, parties argued that different dates (or no date at all) should be used as the cut-off date. Specifically, the petitioners and U.S. Steel argued that establishing a date certain conflicts with DOC’s statutory mandate to investigate subsidies, conflicts with the average useful life regulations that support the full recognition of countervailable subsidies, and provides special treatment to China where nothing in the WTO’s Accession Protocol states or implies such special treatment.¹⁰⁴ China ar-

96. *Id.*

97. Certain Steel Nails from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 73 Fed. Reg. 33,977, Issues and Decision Memorandum cmt. 5 (June 16, 2008); Nails from the UAE, *supra* note 93, at Issues and Decision Memorandum cmt. 5.

98. Nails from the UAE, *supra* note 93, at Issues and Decision Memorandum cmt. 7.

99. *Id.* Issues and Decision Memorandum cmt. 8.

100. *Id.* at Issues and Decision Memorandum cmt. 4; *see also* Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations, 73 Fed. Reg. 26,371 (proposed May 9, 2008).

101. See Withdrawal of Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 Fed. Reg. 74930 (Dec. 10, 2008).

102. Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 73 Fed. Reg. 31,966, Issues and Decision Memorandum cmt. 2 (June 5, 2008), available at <http://ia.ita.doc.gov/frn/summary/prc/E8-12606-1.pdf> [hereinafter Circular Welded Pipe from China].

103. Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination, 72 Fed. Reg. 63,875, 63,880 (Nov. 13, 2007).

104. Circular Welded Pipe from China, *supra* note 102, at Issues and Decision Memorandum cmt. 2.

gued for a later cut-off date, such as April 9, 2007—the publication date of the *Coated Free Sheet from China* preliminary results—because parties had no reasonable expectation that the CVD law would be applied to China, and prior practice indicates that the cut-off date should be the moment when DOC determined that a non-market economy country became sufficiently market-based to apply the CVD law.¹⁰⁵

In its final June 2008 determination, DOC continued to find that it was appropriate and administratively desirable to establish a uniform cut-off date of December 11, 2001, to identify and measure subsidies. DOC stated that it “had the discretion not to apply the CVD law where subsidies could not meaningfully be identified or measured” and that its analysis led to the conclusion that the economic changes that occurred leading up to WTO accession allowed DOC to identify or measure countervailable subsidies in China.¹⁰⁶ DOC made similar conclusions in subsequent cases.¹⁰⁷

b. Provision of Inputs for Less Than Adequate Remuneration

The DOC determined that the Government of China was providing inputs for less than adequate remuneration to certain producers of subject merchandise for the first time in *Circular Welded Pipe from China*.¹⁰⁸ This significant determination resulted in specific findings relating to a determination of what constitutes an “authority” in China and what benchmarks to use the subsidy calculation. These findings were affirmed in subsequent cases and will have a significant impact on future countervailing duty proceedings involving China.

i. *Whether a State-Owned Enterprise Is an “Authority”*

Under U.S. law, a countervailable subsidy is provided when an administrative authority provides a financial contribution that is specific, and a benefit is thereby conferred.¹⁰⁹ The term “authority” means “a government of a country or any public entity within the territory of the country.”¹¹⁰ In the case of China, where there are many state-owned enterprises (SOEs), a crucial question in the investigation of this subsidy became whether an SOE was a public entity with the ability to provide a financial contribution.¹¹¹

The Government of China argued that DOC had to determine individually whether each state-owned supplier was an authority.¹¹² It argued that DOC should apply a five-factor test to determine whether each supplier was a public entity and thus able to provide

105. *Id.*

106. *Id.*

107. See *Laminated Woven Sacks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 Fed. Reg. 35,639, Issues and Decision Memorandum cmt. 2 (June 24, 2008), available at <http://ia.ita.doc.gov/frn/summary/PRC/E8-14256-1.pdf> [hereinafter *Laminated Woven Sacks from China*]; *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 Fed. Reg. 40,480, Issues and Decision Memorandum cmt. A.4 (July 15, 2008), available at <http://ia.ita.doc.gov/frn/summary/PRC/E8-16154-1.pdf> [hereinafter *Off-the-Road Tires from China*].

108. *Circular Welded Pipe from China*, *supra* note 102, at Issues and Decisions Memorandum cmt. 7.

109. 19 U.S.C. §§ 1677(5)(A)-(B) (2000).

110. *Id.* at 5(B).

111. *Circular Welded Pipe from China*, *supra* note 102, at Issues and Decisions Memorandum cmt. 7.

112. *Id.*

a financial contribution.¹¹³ Petitioners countered that China's SOEs were certainly not private and thus constituted public entities as a result of the state's ownership interest and that the five-factor test was relevant to the factual situation at issue.¹¹⁴ Petitioners also argued the treatment of SOEs was consistent with China's obligations under its WTO accession.¹¹⁵ DOC determined that a company with majority state ownership was an "authority" capable of providing a financial contribution.¹¹⁶ DOC subsequently affirmed this determination in *Laminated Woven Sacks from China*¹¹⁷ and *Off-the-Road Tires from China*¹¹⁸ investigations relying on the *CVD Preamble*.¹¹⁹

ii. Determining the Appropriate Benchmark

After a determination that a government provided a good or service, DOC must identify an appropriate market-determined benchmark to measure the adequacy of remuneration for the good or service.¹²⁰ DOC prefers to use tier one, in-country benchmarks, "because such prices generally would be expected to reflect most closely the prevailing market conditions of the purchaser under investigation."¹²¹ The DOC, however, will find that prices for such goods and services are significantly distorted if the foreign government provides the majority, or a substantial portion, of the market and will determine those prices to be an inappropriate basis to measure the benefit.¹²² In *Circular Welded Pipe from China*, because 96.1% of Chinese hot rolled steel production was from SOEs, DOC determined that domestic Chinese prices for hot rolled steel were distorted.¹²³ DOC, however, used another tier one benchmark: actual import prices.

DOC found that one respondent purchased hot rolled steel from a supplier outside of China and that the import price paid was comparable to the benchmark used in preliminary determination, Steel Benchmark prices.¹²⁴ As a result, DOC determined that the

113. *Id.* (citing Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 Fed. Reg. 37, 122, Issues and Decision Memorandum cmt. 1 (June 23, 2003), available at <http://ia.ita.doc.gov/ftn/summary/korea-south/03-15793-1.pdf>).

114. *Id.*

115. See World Trade Organization, Report Of The Working Party On The Accession Of China of 13 November 2001, ¶ 172, WT/MIN(01)/3 ("[W]hen state-owned enterprises (including banks) provided financial contributions, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement.").

116. See *Circular Welded Pipe from China*, *supra* note 102, at Issues and Decision Memorandum cmt. 7.

117. See *Laminated Woven Sacks from China*, *supra* note 107, at Issues and Decision Memorandum cmt. 12.

118. See *Off-the-Road Tires from China*, *supra* note 107, at Issues and Decision Memorandum cmt. D.2.

119. *Laminated Woven Sacks from China*, *supra* note 107, at Issues and Decision Memorandum cmt. 12 (citing Countervailing Duties: Final Rule, 63 Fed. Reg. 65,348, 65,402 (Nov. 25, 1998)) ("This is consistent with the Preamble, which states that 'we intend to continue our longstanding practice of treating most government-owned corporations as the government itself . . .'").

120. The regulations provide a list of potential benchmarks in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation ("tier one"); (2) world market prices that would be available to purchasers in the country under investigation ("tier two"); or (3) an assessment of whether the government price is consistent with market principles ("tier three"). See 19 C.F.R. § 351.511(a)(2) (1999).

121. *Circular Welded Pipe from China*, *supra* note 102, at Issues and Decision Memorandum cmt. 7.

122. *Id.*

123. *Id.*

124. *Id.*; see also Preliminary Affirmative Countervailing Duty Determination: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, 72 Fed. Reg. 63,875, 63, 882 (Nov. 13, 2007).

actual import price and the Steel Benchmark prices were tier one benchmarks and relied on both in the final determination.¹²⁵

In *Off-the-Road Tires from China*, DOC used tier one benchmarks because of the high penetration of imports of both natural and synthetic rubber and lack of other evidence of government distortion, finding that the Chinese natural and synthetic rubber markets were not distorted.¹²⁶ In *Laminated Woven Sacks from China*, DOC used tier two benchmarks, world market prices that would be available to purchasers in China, as its benchmark. Because the Government of China declined to provide the necessary information to examine the extent of government involvement in the petrochemical industry, the DOC applied an adverse inference to find that government ownership distorted the prices for these inputs in China.¹²⁷

c. Provision of Land for Less Than Adequate Remuneration and Out of Country Benchmarks

In the *Laminated Woven Sacks*, DOC determined, for the first time, that the Government of China provided land to a respondent for less than adequate remuneration.¹²⁸ During the investigation, one respondent reported that it was located in an industrial park.¹²⁹ DOC found that, in creating the industrial park, the government at the county level identified a specific, contiguous area of land within its jurisdiction, designated that land as an industrial park, and controlled the granting of land-use rights within the industrial park.¹³⁰ As a result, DOC found that this provision of land-use rights was de jure specific because the land-use rights within the industrial park were limited a designated geographical region pursuant to 19 U.S.C § 1677(5A)(D)(iv). DOC found that the provision of land-use rights was a financial contribution of a "good or service," explaining that the *CVD Preamble* specifically contemplated land-use rights as "goods or services" under 19 C.F.R. § 351.511(a)(2)(iii).¹³¹

In determining the appropriate benchmark, DOC found that a tier one benchmark was not appropriate because there was no private land ownership in China resulting in the distortion of Chinese land prices.¹³² DOC also looked to tier three benchmarks but found that due to government involvement, as well as the widespread and documented deviation from the authorized methods of pricing and allocating land, the purchase of land-use rights in China is not conducted in accordance with market principles.¹³³ As a result, DOC was left with only the tier two (world market price) benchmark.

125. Circular Welded Pipe from China, *supra* note 102, at Issues and Decision Memorandum cmt. 7.

126. Off-the-Road Tires from China, *supra* note 107, at Issues and Decision Memorandum 11. As benchmarks, DOC used each company's monthly weighted average import prices of natural and synthetic rubber and purchases of privately produced domestic natural and synthetic rubber, where available.

127. Laminated Woven Sacks from China, *supra* note 107, at. Issues and Decision Memorandum cmt. 14.

128. *Id.* at Issues and Decision Memorandum cmt. 8.

129. *Id.* at Issues and Decision Memorandum cmt. 9.

130. *Id.*

131. *Id.* at Issues and Decision Memorandum cmt. 8.

132. *Id.* at Issues and Decision Memorandum cmt. 10. DOC confirmed that all urban land (industrial and commercial land) is state-owned, and all rural land is collectively owned (agricultural land, residential land, and land used by township enterprises).

133. *Id.*

Because there is no world market price for land, DOC reviewed the choices respondents made in determining where to locate their factory.¹³⁴ DOC found that producers consider a number of markets, including Thailand, as an option for production bases in Asia beyond China.¹³⁵ Although respondents suggested Indian land prices as a benchmark, DOC noted that there was no evidence that India competes directly with China in attracting producers and determined not to use the land benchmark prices from India because there was no record evidence that land prices from India were comparable to land values in China. Petitioners suggested Taiwan land prices as a benchmark.¹³⁶ DOC found, however, that "Taiwan is not economically similar to China."¹³⁷ As a result, DOC found that the price information for land in Thailand was the best and most appropriate information on the record of this investigation to use as its land benchmark.

d. The Application of DOC's Change In Ownership Methodology

In *Off-the-Road Tires from China*, DOC applied, for the first time since modification, its change in ownership (CIO) methodology.¹³⁸ DOC found that the company purchased by the respondent was an SOE at the time of the CIO and that the transaction was not at arm's length or for fair market value.¹³⁹ As a result, the transaction did not extinguish the non-recurring subsidies provided to the SOE prior to the CIO, and the DOC attributed the subsidies to the new company.¹⁴⁰ Specifically, DOC attributed the debt forgiveness and forgiveness of loan guarantees received by the purchased SOE to the respondent. In addition, DOC found that the government provided the respondent with land for less than adequate remuneration.

The respondent argued that the government relinquished its shares in previous company years prior to the CIO and that there was no government control.¹⁴¹ DOC found that the government retained a significant level of control over the company and that there was a rebuttable presumption that village committees were authorities.¹⁴² Thus, the requirement of complete relinquishment of government control was not met.¹⁴³

DOC also found that the transaction was not at arm's length because the chairman of the prior company represented both the buyer and seller in the auction of equipment, and the employee-owners had interests in the successful completion of the transaction.¹⁴⁴ DOC found that what was significant was "whether the buyer and seller each acted in its own interests and the interests of the buyer and seller were independent of each other."¹⁴⁵

134. *Id.* at Issues and Decision Memorandum cmt. 11.

135. *Id.*

136. *Id.*

137. *Id.*

138. See *Off-the-Road Tires from China*, *supra* note 107, at Issues and Decision Memorandum 18-21; see also Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 Fed. Reg. 37,125 (June 23, 2003).

139. See *Off-the-Road Tires from China*, *supra* note 107, at Issues and Decision Memorandum 18-21.

140. *Id.*

141. See *Off-the-Road Tires from China*, *supra* note 107, at Issues and Decision Memorandum cmt. F.3.

142. *Id.*

143. See Notice of Final Modification 68 Fed. Reg. at 37,127.

144. See *Off-the-Road Tires from China*, *supra* note 107, at Issues and Decision Memorandum cmt. F.4.

145. *Id.*; see also Notice of Final Modification 68 Fed. Reg. at 37,127, 37,130.

DOC found, *inter alia*, that the employees had an interest in the purchasing company at the time they were required to approve the transaction as owners.¹⁴⁶

Finally, DOC reviewed the factors provided in the *Modification Notice* and determined that the parties did not affirmatively demonstrate that the sale was at arm's length for fair market value.¹⁴⁷ DOC highlighted that the test for fair-market value was "whether the government, in its capacity as the seller, acted in a manner consistent with the normal sales practices of private, commercial sellers in that country."¹⁴⁸ Here, DOC found that the parties did "not show that private, commercial sellers in China routinely ignore standard considerations in a sale of this magnitude."¹⁴⁹

B. AGENCY POLICY INITIATIVES: WITHDRAWAL OF CERTAIN REGULATORY PROVISIONS

1. *Withdrawal of Regulations Covering Tolling*

On March 28, 2008, DOC withdrew the regulation covering the treatment of tollers or subcontractors, 19 C.F.R. § 351.401(h).¹⁵⁰ DOC intended this regulation, promulgated in 1997,¹⁵¹ to ensure that DOC's analysis in calculating a dumping margin focused on the party setting the price of subject merchandise when it subcontracted the manufacture of such merchandise to another company. The U.S. Court of International Trade (CIT), however, recently interpreted the regulation as having the unintended effect of bestowing the status of "foreign manufacturer" or "producer" upon parties in the United States that otherwise would have assumed the status of purchasers of subject merchandise.¹⁵²

DOC stated that the CIT's interpretation could restrict the exercise of DOC's discretion and result in DOC identifying the wrong entity as the seller of subject merchandise. Moreover, DOC determined that the CIT's interpretation confounds the Department's ability to determine instances of dumping by examining the price at which the merchandise is first sold in the United States.¹⁵³

DOC also determined that the proper application of the law would be thwarted if a party that "customarily assumes the status of a 'purchaser' is bestowed with the status of 'foreign manufacturer' or producer."¹⁵⁴ If such an event occurred, DOC would have no basis upon which to make antidumping duty determinations because the actual consumer would be considered the "foreign producer" without making any sales of subject merchandise. As a result, DOC found that it could not calculate a dumping margin because there would be no sales to compare, or its margin calculation could be distorted or miscalculated because the incorrect U.S. sales were identified as the relevant sales under the regula-

146. See *Off-the-Road Tires from China*, *supra* note 107, at Issues and Decision Memorandum cmt. F.4.

147. See Notice of Final Modification, 68 Fed. Reg. at 37,127.

148. See *Off-the-Road Tires from China*, *supra* note 107, at Issues and Decision Memorandum cmt. F.5.

149. *Id.*

150. See Withdrawal of Regulations Governing the Treatment of Subcontractors, 73 Fed. Reg. 16,517 (Mar. 28, 2008).

151. Antidumping Duties; Countervailing Duties, 19 C.F.R. 351, 353, and 355 (May 19, 1997).

152. See *USEC Inc. v. United States*, 281 F. Supp. 2d 1,334 (Ct. Int'l Tr. 2003), *aff'd on other grounds sub nom.*, *Eurodif v. United States*, 411 F.3d 1355, 1364 (Fed. Cir. 2005).

153. See Withdrawal of Regulations, 73 Fed. Reg. at 16,517.

154. *Id.*

tion.¹⁵⁵ In addition, purchasers bestowed with the status of “foreign manufacturer” or producer would incorrectly obtain the right to appeal DOC’s antidumping determinations as interested parties.¹⁵⁶

DOC found these effects inconsistent with its intentions and statutory mandate to provide relief to domestic industries suffering material injury from unfairly traded imports. DOC determined that immediate revocation was necessary to ensure the proper and efficient operation of the antidumping law and to provide the relief intended by Congress. DOC stated that it was “not replacing this regulation with a new regulation,” but “is returning to a case-by-case adjudication, until additional experience allows the Department to gain greater understanding of the problem.”¹⁵⁷

2. *Withdrawal of Regulations Covering Targeted Dumping*

On December 10, 2008, DOC withdrew the regulatory provisions governing targeted dumping, 19 C.F.R. § 351.414(f), (g), and 351.301(d)(5).¹⁵⁸ DOC explained that, at the time it promulgated these regulations on May 19, 1997, it had never performed a targeted dumping analysis and had no departmental experience on the issue.¹⁵⁹ Thus, DOC determined that it “may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping, contrary to the Congressional intent” and found that the immediate revocation of the provisions would facilitate the proper and efficient operation of the antidumping law.¹⁶⁰

The Tariff Act of 1930, as amended, directs DOC normally to calculate dumping margins for comparable merchandise by one of two methods: (1) by comparing weighted-average normal values to weighted-average export prices (i.e., the average-to-average method); or (2) by comparing the normal values of individual transactions to the export price of individual transactions (i.e., the transaction-to-transaction method).¹⁶¹ There is an exception which may be used to prevent the masking of certain types of dumping, i.e., targeted dumping. When DOC finds that there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and where such differences cannot be taken into account using one of the two preferred methods, DOC can invoke the exception and compare the weighted average of the normal values to the export price of individual transactions (i.e., average-to-transaction methodology).¹⁶²

Because DOC did not have the benefit of any departmental experience on the issue of targeted dumping at the time of promulgation, the regulatory provisions add additional criteria beyond the scope original sections in the Tariff Act. Specifically, 19 C.F.R. § 351.414(f) and (g) established certain criteria for analyzing targeted dumping allegations and were intended to clarify when the average-to-transaction methodology would be

155. *See id.*

156. *See* 19 U.S.C. § 1677(9) (2000).

157. *See* Withdrawal of Regulations, 73 Fed. Reg. at 16,518.

158. Withdrawal of Regulations Governing Targeted Dumping, 73 Fed. Reg. 74930.

159. *Id.*

160. *Id.*

161. *See* 19 U.S.C. § 1677 f-1(d)(1)(A).

162. *See* 19 U.S.C. § 1677 f-1(d)(1)(B).

used.¹⁶³ DOC explained that these provisions may have prevented the use of the average-to-transaction methodology to unmask dumping. Moreover, 19 C.F.R. § 351.301(d)(5), which established the deadline for submitting allegations, may have established an impractical deadline. Thus, these sections would act to deny relief to domestic industries suffering material injury from unfairly traded imports, an effect contrary to DOC's intention in promulgating the provisions and inconsistent with its statutory mandate to provide relief to domestic industries materially injured by unfairly traded imports. As a result, DOC determined that immediate revocation necessary to ensure the proper and efficient operation of the antidumping law and to provide the relief intended by Congress.

C. COURT OF INTERNATIONAL TRADE AND COURT OF APPEALS FOR THE FEDERAL CIRCUIT CASES

There were few important precedential trade cases in 2008. Although there were a healthy number of cases at both the Court of Appeals for the Federal Circuit (CAFC or Federal Circuit) and the CIT, most of them were of interest to the parties only, as they generally represented the application of long-standing trade-law doctrines. A few cases, however, will have some long-standing impact, as briefly summarized below.

1. *Fraud-in-the-Proceeding Cases*

A recent recurring issue has been the authority of DOC and the International Trade Commission (ITC or Commission) to take steps to deal with previous investigations that turn out to have been tainted by fraud. Both the CAFC and the CIT dealt with this issue in 2008.

In *Tokyo Kikai Seisakusho, Ltd. v. United States*,¹⁶⁴ the Federal Circuit faced a situation where DOC used its changed circumstances review provisions as a means of reconsidering previously completed administrative reviews. The issue arose because DOC had concluded that its previous partial revocation of an antidumping duty order with regard to Tokyo Kikai was tainted because the company had provided false information during previous reviews.¹⁶⁵

The Federal Circuit upheld DOC's novel use of the changed circumstances review procedures. The court acknowledged that the changed circumstances review statute only provided three situations where such reviews could occur and that the list did not include rectifying fraud. The court, however, concluded that the "power to reconsider is inherent in the power to decide," especially when the agency has exercised its power "to protect the integrity of its own proceedings from fraud."¹⁶⁶ The court concluded that, absent a statutory bar to such a review, DOC could take actions such as reinstating a partially revoked order, even if not explicitly authorized to do so, to rectify fraudulent activity.

163. Withdrawal of Regulations Governing Targeted Dumping 73 Fed. Reg. 74931.

164. *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352 (Fed. Cir. 2008).

165. See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan: Final Results of Changed Circumstances Review, 71 Fed. Reg. 11,590, 11,591 (Mar. 8, 2006).

166. *Seisakusho*, 529 F.3d at 1360-62.

A few months later, the CIT reached a similar result, underscoring the flexibility that the agencies are granted in this area. In *Elkem Metals Co. v. United States*,¹⁶⁷ the CIT issued what should be its last determination regarding the ITC's treatment of the U.S. ferrosilicon industry, which had been engaged in a price-fixing conspiracy that had illegally raised prices during part of the period of investigation considered by the ITC in its original injury determination. In previous rulings in the same case, the CIT had held that the ITC had the authority to reconsider rulings that were tainted by the illegal actions of petitioners. The only issue in this case was whether the ITC's determination on remand that any observed underselling was due to artificially high U.S. prices the illegal conspiracy raised was supported by substantial evidence. The Court found that the Commission had articulated a reasonable rationale for excluding any price comparisons during the period when the conspiracy to raise prices was occurring, and that it was reasonable for the Commission to conclude that "underselling was not pervasive over the entire [period of investigation]" as a result.¹⁶⁸ Although it took four remand determinations, the end result was a ratification of an ITC decision to take steps to remedy a record tainted by an illegal conspiracy, thereby obscuring the true state of the U.S. industry.

2. Appeals of ITC Cases

CIT again revisited the frequent topic of how to apply the causation standard in *NSK Corporation v. United States*.¹⁶⁹ The case involved the second sunset review of the ball bearings orders, which the ITC had concluded should not be revoked because doing so would lead to the continuation or recurrence of material injury.¹⁷⁰ The respondents argued that the Commission should have extended the Federal Circuit's holding in *Bratsk Aluminum Smelter v. United States* that in cases involving commodity products the Commission had to "explain why the elimination of subject imports would benefit the domestic industry," rather than non-subject imports,¹⁷¹ to sunset reviews. The CIT agreed that this was a reasonable formulation of the statute, which contains an "implied element of causation,"¹⁷² thereby making application of the basic *Bratsk* principle proper in a sunset review.¹⁷³

In the end, the CIT returned the case to the ITC, due to a blatant inconsistency in the Commission's treatment of the continuing role of subject imports in the U.S. market. In previous cases, the Commission had stated that an increase in subject imports following the order indicates that material injury is unlikely to occur if the order were revoked because the imports were able to compete even without dumping. In the case before the Court, however, the Commission reached the opposite conclusion, finding that the "ongoing and significant presence of subject imports in the U.S. market demonstrates the continued importance of the U.S. market to subject producers and further shows that

167. *Elkem Metals Co. v. United States*, No. 99-00627, 2008 WL 4097463 (Ct. Int'l Tr. Sept. 5, 2008).

168. *Id.* at 22-24 & 29.

169. *NSK Corp. v. United States*, 577 F. Supp. 2d 1322 (Ct. Int'l Tr. 2008).

170. *See Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 71 Fed. Reg. 51,850 (Aug. 31, 2006).

171. *NSK Corp.* 593 F. Supp. 2d at 1330-31 (quoting *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1373 (Fed. Cir. 2006)).

172. *Id.* at 1332.

173. *Id.*

subject imports already have distributors or customers in place for their products.”¹⁷⁴ Stating that it had to “question the disparate treatment of similar findings from one sunset review to another,” the Court sent the case back to the Commission for reconsideration, taking into account the need to apply the *Bratsk* analysis as well as providing a more comprehensive discussion of supply conditions.¹⁷⁵

Just two weeks later, the Federal Circuit issued another case interpreting the *Bratsk* requirement—this time in an investigation. In *Mittal Steel Point Lisas Ltd. v. United States*, the Federal Circuit held that the *Bratsk* case did not require that the Commission engage in a future-looking inquiry regarding whether an order on a commodity product would “lead to the elimination of those goods from the market in the future or whether those goods would be replaced by goods from other sources.”¹⁷⁶ The CAFC, instead, clarified that *Bratsk* requires the Commission to determine whether, during the period of investigation, injury was fairly traceable to the presence of unfairly traded subject imports, or whether their absence would merely have meant that non-subject imports would have taken their place. Thus, the CAFC clarified that the “focus of the inquiry is on the cause of injury in the past, not the prospect of effectiveness in the future.”¹⁷⁷

In other cases of interest, the CIT held that:

- The Commission had not erred by issuing a negative final determination in the second sunset review of cut-to-length steel plate, thereby revoking the orders on plate from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom;¹⁷⁸
- The statute allowed for the possibility that different Commissioners might rely upon separate rationales in reaching a determination, and the Commission did not err by retaining the order on Romanian small-diameter carbon and alloy seamless standard, line, and pressure pipe even though some of the Commissioners evaluated Romanian pipe on a cumulated basis and others evaluated it individually;¹⁷⁹
- The Commission’s finding that there was unlikely to be significant shifting of imports to the United States was reached using a reasonable methodology that showed that U.S. prices were in line with global prices, and the determination to revoke the orders on silicon metal from Brazil and China would not lead to a continuation or recurrence of material injury was supported by substantial evidence;¹⁸⁰
- The Commission had failed to provide sufficient evidence to support its finding that the U.S. saw blade market was divided into different segments that resulted in attenuated competition with imported diamond saw blades, and the ITC had to reconsider its finding that subject imports were not a cause of material injury to the U.S. industry;¹⁸¹ and

174. *Id.* at 1334.

175. *Id.*

176. *Mittal Steel Point Lisas Ltd. v. United States*, 53 F.3d 867, 876 (Fed. Cir. 2008).

177. *Id.* at 16.

178. *Nucor Corp. v. United States*, 569 F. Supp. 2d 1328 (Ct. Int’l Tr. 2008).

179. *Mittal Steel Roman v. United States*, No. 06-00173, 2008 WL 111025 (Ct. Int’l Tr. Jan. 11, 2008).

180. *Globe Metallurgical Inc. v. United States*, 547 F. Supp. 2d 1371 (Ct. Int’l Tr. 2008).

181. *Diamond Sawblades Mfrs. Coal. v. United States*, No. 06-00247, 2008 WL 576988 (Ct. Int’l Tr. Feb. 6, 2008).

- The Commission properly used its normal methodology of evaluating negligibility using a quantity-based measure, since the products at issue were relatively uniform, and the Commission had not erred by finding that certain lined paper school supplies from China, India, and Indonesia were causing material injury.¹⁸²

3. Appeals of DOC Determinations

With many recent antidumping cases involving products from China, the special rules involving how margins should be calculated for non-market economies have been the subject of much litigation in recent years. In some cases, these rules spill over into seemingly unrelated cases, as occurred in *Husteel Co. v. United States*, where Korean producers of oil country tubular goods protested DOC's decision to leave out of their margin calculation any sales that were made while knowing that the final destination would be in China. DOC had taken this approach on the grounds that these sales would not be representative because a sale ultimately intended for a Chinese company would be tainted since it was not negotiated "on the basis of market principles."¹⁸³

The CIT had a number of problems with this approach. Its chief issue was that DOC's presumption that any sales to Chinese companies are unrepresentative was inconsistent with DOC's practice in cases directly involving non-market economy producers, where DOC "regularly calculates normal value using price data from sales between market-economy sellers and nonmarket-economy buyers."¹⁸⁴ The Court also found it troubling that DOC was applying its presumption in the case at hand, in that the sales at issue were in fact "between two independent entities both operating in a market economy," with the ultimate sale to a Chinese company only to occur later.¹⁸⁵ Finally, the Court noted that DOC had not even considered the possibility that the sales could have occurred based upon global prices and thus presumptively were not even distorted at all.¹⁸⁶ The CIT accordingly remanded the case for reconsideration by DOC.

Also of interest was the CIT's determination in *Canadian Wheat Board v. United States*,¹⁸⁷ which involved the question of whether DOC is required to order the refund of all duties collected after it has revoked an order. Much of the argumentation of the case was devoted to the issue of whether the Court had jurisdiction to hear the action. Once it had settled the question of jurisdiction, the Court had little difficulty finding that its earlier decision in *Tembec, Inc. v. United States*¹⁸⁸ compelled it to find that where the ITC issues a negative injury determination, DOC is required to refund all duties where liquidation is still suspended.¹⁸⁹

In other significant opinions, the CIT held that:

- The standard for determining whether a product is "later-developed merchandise" and hence can be included within the scope of an antidumping or countervailing

182. *Navneet Publications (India) Ltd. v. United States*, No. 06-00401, 2008 WL 743836 (Ct. Int'l Tr. Feb. 26, 2008).

183. *Husteel Co. v. United States*, 558 F. Supp. 2d 1357, 1359 (Ct. Int'l Tr. 2008).

184. *Id.* at 1361.

185. *Id.* at 1358.

186. *Id.* at 1360-61.

187. *Canadian Wheat Bd. v. United States*, 580 F. Supp. 2d 1350 (Ct. Intl Tr. 2008).

188. *Tembec, Inc. v. United States*, 441 F. Supp. 2d 1302, (Ct. Intl Tr. 2006).

189. *See Canadian Wheat Bd.*, 580 F. Supp. 2d 1350.

duty order, even if not explicitly included in the original investigation, depends on whether the merchandise was “commercially available;”¹⁹⁰

- DOC is entitled to corroborate a margin calculated on the basis of “adverse facts available” with the highest margins calculated in an earlier review. Although the Court found it “troubling” that the margin so corroborated was nine times higher than the overall margin from the earlier review, it reluctantly concluded that it had to allow the approach due to a binding precedent from the Federal Circuit;¹⁹¹ and
- DOC is justified in changing its methodology from a prior administrative review. Any claim that the respondent had detrimentally relied upon the old methodology was meaningless where the change was necessitated by the failure of the respondent’s affiliated supplier to provide requested information.¹⁹²

4. *Assessment/Duty Rulings*

The long-simmering issue of whether the Continued Dumping and Subsidy Offset Act (commonly referred to as the Byrd Amendment) can be applied to NAFTA signatories finally received an answer from the Federal Circuit. The Byrd Amendment provided that final antidumping and countervailing duties were to be distributed to U.S. producers of the like product that supported the prosecution of the actions leading to the orders. Although the Byrd Amendment has been repealed, it has caused the distribution of billions of dollars of collected duties to U.S. industries, and hundreds of millions of dollars in previously collected duties still remain to be distributed.

When Congress passed the NAFTA, it included a provision (Section 408) that stated that any amendment to Title VII of the Omnibus Trade and Competitiveness Act of 1988 “shall apply to goods from a NAFTA country only to the extent specified in the amendment.”¹⁹³ Because the Byrd Amendment contained no mention that it applied to NAFTA countries, certain Canadian interests, including the Canadian Wheat Board (among others), brought suit to bar distributions of duties imposed on their products.¹⁹⁴

The Federal Circuit ruled in their favor in *Canadian Lumber Trade Alliance v. United States*. The key issue in that case was whether the Canadian interests had standing. The Federal Circuit found that since the distribution of duties to the North Dakota Wheat Commission, which engaged in promotional activities designed to take market share from Canadian wheat producers, caused a “competitive” injury, there was standing for the Canadian Wheat Board to sue.¹⁹⁵ The Federal Circuit further found prudential standing, in that the Canadian Wheat Board was within the “zone of interests” protected by Section 408.¹⁹⁶ Once the CAFC found that there was standing, it easily determined that the Byrd Amendment’s failure to mention any of the NAFTA countries meant that it could not necessarily apply to products from those countries.¹⁹⁷

190. See *Target Corp. v. United States*, 578 F. Supp. 2d 1369 (Ct. Int’l. Tr. 2008).

191. See *Pam, S.P.A. v. United States*, 577 F. Supp. 2d 1318 (Ct. Int’l. Tr. 2008).

192. See *Huvis Corp. v. United States*, No. 06-00380, 2008 WL 2977890 (Ct. Int’l. Tr. Aug. 5, 2008).

193. 19 U.S.C. § 3438 (2000).

194. *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319 (Fed. Cir. 2008).

195. See *id.* at 1333.

196. See *id.* at 1334-35.

197. See *id.* at 1340-42.

The CAFC also announced an important exception to the normal rule that the assessment of duties is set once Customs has liquidated an entry. This rule is nearly always followed because it allows for finality in the assessment of duties. The Federal Circuit held in *Shinyei Corp. of America v. United States* that the need for finality is superseded in the limited circumstance where liquidation occurred at the wrong rate due to Customs or DOC error.¹⁹⁸

5. Procedural Rulings

This year saw the usual grab bag of procedural and jurisdictional rulings bearing on the authority of the trade courts to hear cases and provide meaningful relief. Trade practitioners, ever fearful of missteps that can inadvertently doom an appeal, will be parsing these cases carefully to avoid needless mistakes.

One key issue addressed by the Federal Circuit was the circumstance under which a party can seek a review when all entries at issue have been liquidated. For several decades, this basic issue had seemed to have a ready answer: if all entries covered by an appeal have been liquidated, then the CIT lacks jurisdiction to entertain a direct appeal of the agency's determination since it would not be possible to effectuate the Court's judgment on any of the entries at issue.

In *Gerdau Ameristeel Corp. v. United States*, the Federal Circuit provided clarification of an important exception to this rule. Gerdau brought action seeking judicial review of DOC's finding of a de minimis dumping margin for the Sixth Review, even though all affected entries had been liquidated (due to Gerdau's failure to seek an injunction preventing liquidation). Gerdau claimed that the case was not moot because it "would have the tangible consequence of averting revocation of the Antidumping Order after the Seventh Review" (which could occur if DOC issued a third consecutive de minimis margin in the Seventh Review after previously doing so in the Fifth and the Sixth).¹⁹⁹

The CAFC agreed with Gerdau. The Court distinguished the prior rulings by noting that hearing the action at hand "can have a significant effect on a legal interest distinct from the particular imports subject to the Sixth Review."²⁰⁰ Thus, because the CIT "can provide meaningful relief," the Federal Circuit ruled that the CIT had erred by dismissing the case as moot.²⁰¹

The CIT also issued some other important jurisdictional and procedural rulings, including determinations that:

- An intervenor can join an action, even if it expands the number of entries affected by the case, so long as the addition of a new party does not add any new legal issues for the court to decide;²⁰²
- A party needs to file a *separate* summons and complaint for investigations and sunset reviews from *each* covered country, even though the ITC may have treated the investigations together and issued a combined exposition of its written views;²⁰³ and

198. *Shinyei Corp. of Am. v. United States*, 524 F.3d 1274 (Fed. Cir. 2008).

199. *Gerdau Ameristeel Corp. v. United States*, 519 F.3d 1336, 1339 (Fed. Cir. 2008).

200. *Id.* at 1341.

201. *Id.* at 1342.

202. *NSK Corp. v. United States*, 547 F. Supp. 2d 1312 (Ct. Int'l Tr. 2008).

203. *Id.*

- The CIT will not hear an interlocutory review of DOC's procedural decisions during the course of a review because they are not the result of final agency action.²⁰⁴

D. UNITED STATES SUPREME COURT

The biggest news in 2008 trade appeals was a case that has not yet been finally decided. In *United States v. Eurodif, S.A.*, the U.S. Supreme Court, for the first time in the entire history of the trade law, entertained briefs and oral argument regarding an antidumping duty appeal.²⁰⁵ The issue before the Supreme Court is whether the DOC correctly ruled that it could apply the antidumping duty law, which applies only to "sales" of "merchandise," to sales transactions where energy supply companies (utilities) provide feed uranium and only pay in cash for the service of enrichment. Much of the oral argument centered on the issue of whether the DOC treated services transactions inconsistently and whether the treatment of feed uranium as fungible by both the enrichers and the utilities meant that the return of different uranium than what was originally provided turned the delivery of the final product into a transfer of ownership over feed uranium to enrichers, lending credence to the argument that enrichers engaged in the sale of goods. Oral argument took place on November 4, 2008, and a decision is expected in 2009.

V. Legislative Activity

Developing countries were the big winners in this year's small flurry of legislative activity. Trade preference programs benefiting over 130 developing countries were extended and modified just as they were about to expire. But the movement on trade preference programs stands in stark contrast to the lack of progress on three pending FTAs and other trade-related legislation. A forty-eight hour showdown between President Bush and Congress over the Colombia free trade agreement took a surprising and unprecedented turn, leaving the fate of the agreement in limbo. The Panama and Korea agreements never made it to Congress, and various trade enforcement initiatives got mired in committee. The new Administration and the new Congress will have its work cut out for it in 2009.

A. FREE TRADE AGREEMENTS

Three FTAs signed before the June 30, 2007, expiry of TPA were pending at the outset of 2008.²⁰⁶ Those same three agreements remain pending at the end of 2008. As dis-

204. *Tianjin Magnesium Int'l Co. Ltd. v. United States*, 533 F. Supp. 2d 1327 (Ct. Int'l Tr. 2008).

205. See *Eurodif S.A. v. United States*, 506 F.3d 1051 (Fed. Cir. 2007). In preceding phases of this protracted litigation, the Federal Circuit struck down DOC's imposition of antidumping duties on low enriched uranium from France, finding that contracts for the enrichment of uranium were contracts for services, rather than for the sale of goods, and therefore not subject to the antidumping statute. See *Eurodif S.A. v. United States*, 411 F.3d 1355, 1364 (Fed. Cir. 2005); *Eurodif S.A. v. United States*, 423 F.3d 1275, 1278 (Fed. Cir. 2005). Both the U.S. Government and the petitioner in the original antidumping case, United States Enrichment Corporation (USEC), appealed to the Supreme Court.

206. The United States-Colombia Trade Promotion Agreement was signed on November 22, 2006, and subsequently amended on June 28, 2007; The United States-Panama Trade Promotion Agreement was signed on June 28, 2007; and the United States-Korea Free Trade Agreement was signed on June 30, 2007. See generally Office of the U.S. Trade Representative, Bilateral Trade Agreements, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Apr. 3, 2009).

cussed below, the only notable activity with regard to these agreements was President Bush's attempt to force a Congressional vote on the Colombia Free Trade Agreement, which ultimately failed when the House of Representatives changed the "fast track" rules.

Trade promotion, or fast track, authority allows for expedited consideration of trade agreements.²⁰⁷ Once an implementing bill is formally introduced, Congress has ninety legislative days to act. The fast track rules do not permit amendments in Committee or floor action, and they require a straight "up or down" vote. While the "fast track" procedures for Congressional actions during the ninety-day period are set forth in the statute, these procedures are actually House and Senate rules and as such, can be modified at their discretion.²⁰⁸

On April 8, 2008, without prior Congressional acquiescence, President Bush formally submitted to Congress the United States-Colombia Trade Promotion Agreement, along with the implementing legislation and a statement of administrative action.²⁰⁹ Congressional leaders reacted negatively to President Bush's disregard of the unwritten, but established, protocol that the President not trigger the ninety-day clock until the Congressional leadership indicates it is ready to receive the agreement.²¹⁰ Two days later, the House of Representatives voted to "not apply" the procedural requirements that the House act on the implementing legislation,²¹¹ and thereby essentially put the Colombia free trade agreement on hold.

B. TRADE PREFERENCE PROGRAMS

The United States maintains various trade preference programs that benefit developing countries around the world. As discussed below, Congress extended multiple programs that were set to expire in 2008.

Under the Andean Trade Preferences Act (ATPA), the United States extends special duty treatment to imports from Bolivia, Colombia, Ecuador, and Peru that meet domestic content and other requirements.²¹² Set to expire on December 31, 2008,²¹³ the trade

207. TPA, which allowed for expedited consideration of trade agreements, expired June 30, 2007. See Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, § 2103(c)(1)(B), 116 Stat. 1006 (codified as amended at 19 U.S.C.A. § 3803).

208. See Trade Act of 1974, § 151, Pub. L. No. 93-618 (codified as amended 19 U.S.C. § 2191). See also CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, TRADE AGREEMENTS: PROCEDURE FOR CONGRESSIONAL APPROVAL AND IMPLEMENTATION 2 (updated Mar. 16, 2005), available at http://assets.opencrs.com/rpts/RL32011_20050316.pdf ("Although this statute is permanent law, it has been enacted as an exercise of the rulemaking power of either House and can be changed by either House, with respect to its own procedure, at any time, in the same manner and to the same extent as any other rule of that House.").

209. See Press Release, White House, President Bush Signs Letter to Send the United States-Colombia Free Trade Agreement Implementing Legislation to Congress (Apr. 7, 2008), available at <http://merln.ndu.edu/archivepdf/colombia/WH/20080407-5.pdf>.

210. See Press Release, Speaker of the U.S. House of Rep., Pelosi and Rangel Statement on Administration Sending Colombia Free Trade Agreement to Congress (Apr. 7, 2008), available at <http://speaker.house.gov/newsroom/pressreleases?id=0596>.

211. H.R. Res. 1092, 110th Cong. (2008) (enacted).

212. The Andean Trade Preferences Act went into effect on December 4, 1991. Pub. L. No. 102-182, 105 Stat. 1236. Later, it was renewed and modified under the Andean Trade Promotion and Drug Eradication Act on August 6, 2002. Pub. L. No. 107-210, 116 Stat. 1023 (codified as amended at 19 U.S.C. §§ 3201-3202).

preferences were extended for Peru and Colombia until December 31, 2009.²¹⁴ Shorter extensions were set for Ecuador²¹⁵ and Bolivia²¹⁶ because of Congressional concerns on issues such as counternarcotics cooperation and treatment of U.S. investors.²¹⁷ President Bush apparently had similar concerns, suspending Bolivia's participation in the ATPA as of December 15, 2008, after determining that the Bolivian government failed to meet counternarcotics cooperation criteria.²¹⁸

The Generalized System of Preferences (GSP) program also was extended. Under the GSP program, the United States provides preferential duty-free entry for more than 4,600 products from over 130 designated beneficiary countries and territories in the developing world.²¹⁹ Set to expire on December 31, 2008, the GSP program was reauthorized and extended until December 31, 2009.²²⁰

Other programs, such as the African Growth and Opportunity Act (AGOA) and CAFTA-DR Act, were modified to enhance access to the U.S. market for certain textiles and apparel products. Under AGOA, the United States extends preferential trade benefits to sub-Saharan African countries pursuing political and economic reform.²²¹ The changes to AGOA include a repeal of the "abundant supply" provision to ensure that least-developed AGOA countries can use third country fabric in apparel qualifying for duty-free treatment and a reinstatement of Mauritius' eligibility to use third country fabric in AGOA-qualifying exports.²²² Amendments to the CAFTA-DR Act²²³ permit certain ap-

213. Legislation was enacted in February 2008 to extend the trade preferences from June 30, 2008, until December 31, 2009. Pub. L. No. 110-91, 122 Stat. 646 (2008).

214. See Andean Trade Preference Act Extension, Pub. L. No. 110-436, § 1, 122 Stat. 4976 (2008). The free trade agreements with Peru and Colombia, if and when implemented, would replace the preference program for those countries. President Bush signed the United States-Peru Trade Promotion Agreement Implementation Act into law on December 14, 2007. Pub. L. No. 110-138, 121 Stat. 1455 (2007). The Peru Agreement will go into effect when the President determines that Peru has taken measures necessary to comply with its obligations under the Agreement. As discussed above, House consideration of the Colombia Agreement was suspended.

215. Trade preferences for Ecuador were extended until June 30, 2009, and will be extended automatically until December 31, 2009, unless the President determines that Ecuador does not satisfy ATPA criteria. Pub. L. No. 110-436, § 1, 122 Stat. 4976 (2008).

216. Trade preferences for Bolivia were extended until June 30, 2009, at which point the preferences will expire unless the President determines that Bolivia satisfies ATPA requirements. Pub. L. No. 110-436, § 1, 122 Stat. 4976 (2008).

217. See Press Release, Office of Senator Grassley, Grassley Wins Victory on Andean Trade Preferences Bill, Which Passes Senate, Heads to House (Oct. 2, 2008), available at http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=17559#.

218. See Proclamation No. 8323, 73 Fed. Reg. 72,677 (Nov. 28, 2008); Andean Trade Preference Act (ATPA), as Amended: Notice Regarding Eligibility of Bolivia, 73 Fed. Reg. 57,158 (Oct. 1, 2008).

219. The Generalized System of Preferences program was instituted on January 1, 1976, and authorized under the Trade Act of 1974 (19 U.S.C. §§ 2461-67) for a ten-year period. It has been renewed periodically since then.

220. See Andean Trade Preference Act Extension, Pub. L. No. 110-436, § 4, 122 Stat. 4976 (2008).

221. The African Growth and Opportunity Act was enacted as Title I of the Trade and Development Act of 2000. Pub. L. No. 106-200, 114 Stat. 251 (2000). It has been amended and extended since then. See, e.g., Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002); and AGOA Acceleration Act of 2004, Pub. L. No. 108-274, 118 Stat. 820 (2004).

222. See Andean Trade Preference Act Extension, Pub. L. No. 110-436, § 3, 122 Stat. 4976 (2008).

223. President Bush signed the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (the "CAFTA-DR Act") into law on August 2, 2005. Pub. L. No. 109-53, 119 Stat. 462 (2005).

parel products from the Dominican Republic, which use U.S. fabric and limited amount of third country fabric, to enter the U.S. market duty-free.²²⁴

The Haitian Hemispheric Opportunity through Partnership Encouragement (HOPE) Act²²⁵ also was modified to simplify the rules for allowing Haitian apparel to qualify for duty-free access to the U.S. market.²²⁶ Additionally, under the HOPE Act, a new labor monitoring mechanism was added and preferential treatment for apparel imports was extended until September 30, 2018.²²⁷ Preferential access for certain textile and apparel products under the Caribbean Basin Initiative (CBI)²²⁸ also was extended until September 30, 2010.²²⁹

C. LOOK AHEAD TO 2009

Over the course of the coming year, the new 111th Congress will likely tackle a series of contentious trade-related legislative initiatives left unaddressed by the previous Congress. Those initiatives include consideration of whether undervaluation of foreign currency vis-à-vis the U.S. dollar is actionable under the antidumping or countervailing duty laws; trade adjustment assistance; trade enforcement legislation, including proposals to codify the DOC's authority to apply the countervailing duty law to nonmarket economy countries; limiting presidential discretion in Section 421 China safeguard measures; and establishing the position of chief trade enforcement officer in the Office of the U.S. Trade Representative. In short, 2009 looks to be a busy year for the new Administration and the new Congress.

224. See Andean Trade Preference Act Extension, Pub. L. No. 110-436, § 2, 122 Stat. 4976 (2008).

225. The Haitian Hemispheric Opportunity through Partnership Encouragement (HOPE) Act provides duty-free access to the U.S. market for certain apparel articles if they meet strict guidelines and rules of origin. Pub. L. No. 109-432, §§ 5001-06, 120 Stat. 3181(2006).

226. See Food, Conservation, and Energy Act of 2008 (Farm Bill), Pub. L. No. 110-246, § 15402, 122 Stat. 1651 (2008).

227. Farm Bill, Pub. L. No. 110-246, § 15403, 122 Stat.1651 (2008).

228. The Caribbean Basin Recovery Act (CBERA), commonly referred to as the Caribbean Basin Initiative or CBI, was enacted on August 5, 1983. Pub. L. No. 98-67, 97 Stat. 369 (1983) (codified at 19 U.S.C. 2701-07). Under CBI, the United States extends duty-free treatment to a variety of products from over twenty Caribbean Basin countries and territories. The CBI has been modified a number of times since 1983.

229. Farm Bill, Pub. L. No. 110-246, § 15408, 122 Stat. 1651 (2008).

